

EXHIBIT 20

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December 13, 2018

By Certified Mail
Return Receipt Requested

Secretary of the Army
Attention: Office of General Counsel
Freedom of Information Act Appeal
c/o U.S. Army Engineer District, Omaha
Attention: CENWO-OC
1616 Capitol Avenue
Omaha, Nebraska 68102-4901

Secretary of the Army
Attention: Office of the General Counsel
Freedom of Information Act Appeal
Department of the Army
104 Army Pentagon
Washington, DC 20301-0104

United States Army Special Operations
Command
Freedom of Information Act Office
USASOC (AOIM-FOIA)
2929 Desert Storm Drive
Fort Bragg, N.C. 28310-9110

U.S. Army Freedom of Information Office
Department of the Army
7701 Telegraph Road
Casey Building, Suite 144
Alexandria, VA 22315-3905

Re: Appeal of Freedom of Information Act Request No. 18-081/18-0157 (referred to by USACE as FOIA Request No. FA-18-0052)

Dear Sir or Madam:

We represent Watts Constructors, LLC ("Watts").

In accordance with 5 U.S.C. § 552, Watts appeals the United States Army Corps of Engineers' ("USACE") 14 September 2018 response to FOIA Request No. 18-081/18-0157 (the "Request"), referred to USACE for decision by the United States Army Special Operations Command ("USASOC").

Watts requests that the Department of the Army's ("DA") appellate authority review the propriety of: (1) the methods employed by USASOC to search its documents and records; (2)



USASOC's decision to refer Watts' FOIA request to USACE; and (3) USACE's subsequent response to Watts' FOIA Request.

USACE wrongfully inserted itself into the administration and processing of Watts' Request. Accordingly, Watts further requests that the DA's appellate authority direct USASOC to conduct a thorough, independent search of its records without interference from USACE, and order both USASOC and USACE to produce all responsive documents and records withheld from Watts immediately. Over the past year, USASOC and USACE have stonewalled Watts, provided unreasonable fee estimates, repeatedly disregarded FOIA's response times, and impeded Watts ability to promptly obtain documents and records. USACE's and USASOC's conduct is clearly meant to discourage Watts from obtaining documents to which it is rightfully entitled under the FOIA. In support of its appeal, Watts offers the following:

I. Background

On or about 17 July 2014, USACE awarded Watts Contract No. W9128F-14-C-0024 (the "Contract") for the design and construction of the Special Operations Forces Battalion Operations Facility Complex at Fort Carson, Colorado (the "Project"). The end users of the Project are USASOC and 10th Special Forces Group ("10th SFG"). Although USACE was building the Project for USASOC and 10th SFG, various members of USASOC and 10th SFG were involved in the administration of the Contract and oversight of the construction of the Project.

On 30 January 2018, USACE wrongfully terminated Watts' Contract for default. On 06 February 2018, Watts filed its timely and proper Notice of Appeal from the USACE Contracting Officer's 30 January 2018 termination decision. Watts' Appeal is currently pending before the Armed Services Board of Contract Appeals ("ASBCA") as Case No. 61518 (the "Litigation").

On 20 February 2018, this firm, on behalf of Watts, filed a FOIA Request with USASOC seeking certain USASOC and 10th SFG documents and records related to the Project. Watts' FOIA request was separate from the discovery requests Watts served on USACE in the Litigation, and included 14 reasonable requests for documents and records in USASOC's possession and control. The DA's appellate authority should consider the following facts on appeal, all of which are supported by the enclosed documents and e-mails:

February 20, 2018: Watts filed the Request with USASOC. (**Exhibit 1**)

February 23, 2018: USASOC's FOIA Officer, Mr. Christopher Nesbitt, responded that he was referring the Request to the U.S. Army Corps of Engineers, Omaha District ("USACE"). (**Exhibit 2**)

February 23, 2018 at 2:20 PM EST: We objected to the referral and responded that the Request was directed to USASOC and 10th Special Forces Group and not USACE, and that we fully expected USASOC to review the Request and gather the responsive documents and records. (**Exhibit 3**)



February 23, 2018 at 3:12 PM EST: In reply, USASOC informed us that USACE would have the same communications and documents as USASOC. (**Exhibit 3**)

February 26, 2018: We again reiterated that Watts' Request was directed to USASOC and 10th SFG and that USASOC is required to conduct an independent search of its records without the interference of USACE. We also requested a fee estimate. (**Exhibit 3**)

February 26, 2018 at 11:19 AM EST: USASOC switched its focus to the level of difficulty of the search and resulting fees. (**Exhibit 3**)

February 27, 2018: In good faith, this firm conducted a telephone call with USASOC's FOIA Officer to discuss limiting the scope of the Request to allow USASOC to quickly and efficiently conduct the search.

February 28, 2018: Under a full reservation of rights, we narrowed the Request down from fourteen to five specific inquiries and also narrowed the time period to December 1, 2016 to February 28, 2018 instead of the original period of July 17, 2014 to February 20, 2018. (**Exhibit 4**)

March 5, 2018: USASOC responded that this significantly narrowed version of the Request would cost not less than \$4,224.00. (**Exhibit 4**)

March 6, 2018: We informed USASOC that the fee estimate was unreasonable considering the narrowed scope, but in the spirit of cooperation, agreed to narrow the Request a second time to the time period of December 1, 2017 to February 6, 2018 (just over two months). We also provided USASOC with specific search terms to further narrow the inquiry. (**Exhibit 5**)

March 7, 2018: USASOC informed us that the \$4,224.00 fee estimate was based on a search of the accounts and records of 30,000+ USASOC personnel (and this was the reason for such high fees), but that the fee estimate could be significantly reduced if a specific list of custodians was provided. (**Exhibit 5**)

March 8, 2018: Pursuant to USASOC's request and under a reservation of rights, we narrowed the Request a third time to only four specific USASOC custodians, five specific operators and search terms, and the two-month period of December 1, 2017 to February 6, 2018. (**Exhibit 6**)

March 9, 2018: Despite being provided with a significantly limited scope for the Request, USASOC astonishingly increased its fee estimate from \$4,224.00 to \$7,568.00 and indicated, "You may want to pursue this matter other than through FOIA." (**Exhibit 7**)

March 12, 2018: We requested that USASOC reconsider its position and provide us with a reasonable fee estimate in accordance with its representations of March 7, 2018. (**Exhibit 8**)

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March 13, 2018: USASOC finally provided us with a FOIA control number for the Request, but indicated that it would not reconsider its position. (**Exhibit 8**)

March 16, 2018: USASOC informed us that it would be administratively closing the Request on March 23, 2018. (**Exhibit 9**)

March 16, 2018 at 6:23 PM EST: We replied that we were not withdrawing the Request and maintained that the fee estimate was unreasonable and again asked that USASOC reconsider the estimate in light of its representations that the fees would be significantly reduced if specific custodians could be identified. (**Exhibit 10**)

April 20, 2018: This firm filed a FOIA Appeal with the Secretary of the Army, Office of General Counsel challenging USASOC's decision to assess a fee estimate of \$7,568.00. (**Exhibit 11**)

June 13, 2018: The Secretary of the Army, Office of General Counsel remanded Watts' Request back to USASOC with instructions to assess only reasonable review fees, not search fees. (**Exhibit 12**)

June 22, 2018: In response to the Secretary's remand instructions, USASOC provided Watts with a fee estimate of \$1,280.00. (**Exhibit 13**)

June 26, 2018: This firm, on behalf of Watts, forwarded a check in the amount of \$640.00 to USASOC, representing 1/2 of the estimate fees. (**Exhibit 14**)

July 24, 2018: This firm and USASOC conducted a conference call in which USASOC indicated that it conducted a search of its records and located 2500 documents; however, only a single email "string" was responsive to Watts' Request. USASOC stated that it would be able to release the emails "in a few days."

August 8, 2018: This firm requested an update on the status of USASOC's release of the responsive documents. USASOC replied indicating that it was trying to obtain a release decision from USACE, who was now apparently involved in reviewing Watts' Request. (**Exhibit 15**)

August 23, 2018: USASOC issued a letter referring Watts' FOIA request to USACE on the basis that the requested information "falls under the purview of the U.S. Army Corps of Engineers, Omaha District." (**Exhibit 16**)

August 29, 2018: This firm issued a letter to USASOC objecting to the referral and requesting an explanation from USASOC of the parameters of USASOC's search and the search terms used. That same day, USASOC responded "...the information we located originated at the COE and must be approved [by] them for release" and "Your case is close[d] at our office and you must direct any further questions/concerns with the COE." USASOC again avoided

responding to Watts Request, did not produce any documents, and improperly allowed USACE to take control of the FOIA process. (**Exhibit 17**)

September 14, 2018: USACE Omaha District Counsel Thomas Tracey, who is directly involved in the Litigation, sent this firm a letter: (1) producing the single e-mail string identified by USASOC on 24 July 2018; (2) stating that documents responsive to Watts' FOIA Request Nos. 1-10 and 13 would be produced by USACE in the course of discovery in the Litigation; (3) offering to conduct a search of USACE's electronic records to locate documents related to FOIA Request Nos. 11 and 12 in exchange for payment of \$500; and (4) denying FOIA Request No. 14 on the basis that, "The information requested is exempt from release under FOIA Exemption 5." (**Exhibit 18**)

Watts' Request has been pending since 20 February 2018, and all that has been produced is a single e-mail string. USASOC and USACE have subjected Watts to a long, drawn out process in complete disregard of the FOIA and Watts' right to promptly obtain records. Considering these circumstances, Watts has not responded to USACE's 14 September 2018 letter and instead appeals directly to the Secretary of the Army's Office of General Counsel for a final determination on Watts' Request. Should a satisfactory result not be achieved, Watts will file an appeal with a U.S. District Court.

II. Argument

Watts cooperated in good faith with USASOC and USACE in an attempt to resolve this dispute and reach a compromise on the scope of Watts' February 20, 2018 Request. Despite our efforts, USASOC and USACE did not cooperate and instead decided to stonewall Watts and repeatedly run interference. It's clear, based on the fact that only a single email was produced, that USASOC did not conduct a complete, independent search of its records. Instead, USASOC allowed USACE, the same party Watts is pursuing at the ASBCA, to take complete control of Watts' Request. Watts challenges USASOC's referral, as well as USACE's 14 September 2018 response to Watts' Request, which is nothing more than a last-ditch effort to create the illusion that USASOC and USACE are complying with their FOIA obligations.

A. USASOC did not conduct a comprehensive search of its records

Following the remand of Watts' preliminary FOIA appeal, USASOC did not conduct a comprehensive search of its records to locate documents responsive to Watts' Request.

USASOC claims that it located 2500 records; yet only a single e-mail was related to Watts' Request and the Project. USASOC's claim that it could only locate a single e-mail is incredible, especially where (i) Watts' Request relates to a construction Project that spanned 4 years; (ii) USASOC and 10th SFG personnel were the end users of the Project and, as with other government construction projects, would have information concerning the status of the Project; (iii) USASOC and 10th SFG regularly interacted with both USACE and Watts personnel, including regularly attended meetings and work inspections; and (iv) USASOC and 10th SFG personnel had direct oversight of,

and responsibility for, the security of the Project. 10th SFG guards patrolled and guarded the Project while Watts was working. Further, 10th SFG personnel supervised the design and construction of the Project's Secure Compartmented Information Facilities ("SCIF"). USASOC/10th SFG personnel involved in the Project included Major Adrian Biggerstaff, Sergeant Aaron Marshall, Specialist Anthony Grimes, and Lieutenant Scott Ratzer (among others). To claim that that USASOC and 10th SFG personnel (including these key individuals) only sent and received one email on the Project is disingenuous and strains USASOC's credibility.

Even more, USASOC spent over a month deliberating on whether to produce the single e-mail; and when asked to explain the parameters and methods used to conduct its search, USASOC refused and responded that Watts' case was "closed." See Exhibit 17. USASOC has not been forthcoming regarding what it did (or did not do) to comply with Watts' Request.

All of these circumstances combined indicate that USASOC did not conduct a thorough search of its records. The DA's appellate authority should find USASOC's claim that it could only locate one responsive email to be implausible, and order USASOC to conduct an independent search of its records and produce all documents and records responsive to Watts' Request and related to the Project.

B. USASOC's referral of Watts' Request to USACE was improper

USASOC asserts that the Army's FOIA Regulations permit it to refer Watts' Request to USACE for resolution on the basis that the requested information falls under USACE's "purview." See e.g., Exhibits 3 and 16. The Army's appellate authority should find that this referral was improper.

Army Regulation 25-55, Section 1-508 governs the referral of FOIA Requests from one DoD Component or Army activity to another. Section 1-508 states, in pertinent part,

"A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other Component confirms that it has the requested records, and this belief can be confirmed by the other DoD Component... Within the Army, referrals will be made directly to the offices that may have custody of requested records" (underline added).

Here, Section 1-508 is inapplicable because USASOC cannot reasonably demonstrate that it does not possess records responsive to Watts' Request. In fact, USASOC has never denied that it has responsive records. USASOC merely asserts that, "They [USACE] would have the same communication (emails) we would have, if any exist." See Exhibit 3 at pg. 2. This is not a basis for a referral. To justify a referral, USASOC must not be in possession of any records. While there may be some overlap between the documents and records maintained by USASOC and USACE related to Watts' Request and Project, USASOC and USACE are separate Army activities within the DA, and therefore undoubtedly possess independent, responsive records. For example, USACE would presumably not possess USASOC's internal e-mail communications related to the Project (and vice



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versa). Under the FOIA, USASOC is required to produce documents and records without the interference of USACE. By outright referring Watts' Request, USASOC violated the FOIA.

C. USACE's 14 September 2018 letter does not sufficiently respond to Watts' FOIA Request

For the reasons set forth above, USASOC, and not USACE, was required to respond to Watts' Request. But even assuming USASOC's referral was proper (which it was not), USACE has not sufficiently responded to Watts' Request for the following reasons:

1. *USACE did not produce USASOC/10th SFG documents and records in discovery responsive to FOIA Request Nos. 1-10 and 13.*

In its 14 September 2018 letter, USACE claims that Watts' FOIA Request Nos. 1-10 and 13 are duplicative of Watts' First Set of Requests for Documents ("RFDs") served on USACE in the Litigation. For this reason, USACE asserts that it (and by extension USASOC) is not required to release the records under FOIA. USACE is misguided.

First, Watts never sent a FOIA Request to USACE as claimed on page 2 of USACE's letter. Watts' Request was directed to USASOC only. USACE has an obligation, separate and distinct from Watts' FOIA Request, to produce documents and records in the Litigation. USACE cannot treat Watts' Request and its RFDs as one in the same.

Second, USACE did not produce USASOC's records responsive to FOIA Request Nos. 1-10 and 13 in discovery. Again, Watts' Request seeks USASOC's independent records (and not USACE's). While USACE might have produced some of its own documents responsive to these particular requests in discovery, it did not, and could not, produce USASOC's records because it did not have access to these documents and records.

For example, Watts conducted a search of the documents produced by USACE in discovery applying the search term "Biggerstaff." Major Adrian Biggerstaff was a key player for USASOC/10th SFG on the Project. This search returned 158 results out of 8,732 documents produced. However, on every e-mail included within the 158 results where Major Biggerstaff was a recipient, sender, or listed on the Cc line, a USACE personnel was also copied or listed. USACE clearly did not produce USASOC's internal communications and records.

The DA's appellate authority should require USASOC to conduct an independent search of its records under FOIA without interference from USACE, and irrespective of USACE's discovery obligations in the Litigation.

2. *Watts does not want USACE to conduct a search of USACE's records for FOIA Request Nos. 11 and 12*

In its 14 September 2018 letter, USACE compares Watts' RFDs in the Litigation to Watts' Request and concludes that FOIA Request Nos. 11 and 12 are "...not duplicative of those requests



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made via ASBCA discovery.” USACE then offers to search the records of 5 specific USACE custodians, applying 6 separate search terms, to locate records responsive to Request Nos. 11 and 12. USACE estimates that the cost for conducting this search will be \$500.

To be clear, Watts does not want USACE to conduct a search of its records to locate documents responsive to Request Nos. 11 and 12. This can be handled in the discovery process. Rather, USASOC, the activity to whom Watts’ Request was made, should conduct a search of its own records.

3. *USACE improperly invokes FOIA Exemption 5 to deny Request No. 14*

Watts’ FOIA Request No. 14 seeks, “All documents, including communications between and among USACE and USASOC and/or 10th SFG concerning the estimated time for completion of the Project following the termination of Watts’ Contract.” USACE claims that the information requested is exempt from release under FOIA Exemption 5, and more specifically, the deliberative process privilege. Watts disagrees.

Exemption 5 of FOIA protects “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency...” 5 U.S.C. § 552(b)(5). The three traditional privileges that courts have incorporated into Exemption 5 are the deliberative process privilege, the attorney work product privilege, and the attorney-client privilege. To invoke the deliberative process privilege, the government must establish two perquisites: (1) the documents are pre-decisional; and (2) the documents are deliberative. Here, USACE invokes the deliberative process privilege on the basis that it is re-procuring the Project and that release of the government’s estimates of the timeframe to complete the Contract work prior to Contract award, “would allow the replacement contractor an advantage in developing price proposals.”

First, it’s unlikely that this requested information is “pre-decisional.” During the deposition of Peter Sturdivant (USACE’s Chief of Construction for the Omaha District), Mr. Sturdivant informed Watts that USACE’s reprocurement efforts were likely to be completed by December 2018. Since it’s now December 13, USACE should have no issue with releasing this information.

Second, USACE does not explain how the replacement contractor would gain an advantage by being privy to the government’s time estimate. Presumably, as part of its reprocurement efforts, USACE requested that the replacement contractor complete the remaining Contract work in a specific amount of time. The government frequently provides an estimated time frame in procurements. This information would not be subject to the deliberative process privilege.

Third, USACE waived the deliberative process privilege by already disclosing certain information and records to Watts concerning the estimated time for reprocurement and completion of the Project. Where an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated “confidential,” the government waives any claim that the information is exempt from disclosure under the deliberative process privilege. See *Shell Oil Co. v. I.R.S.*, 772 F. Supp. 202, 209 (D. Del. 1991). Here, USACE admits that it released a February 28, 2018 e-mail

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estimating the reprocurement process at 4-6 months. *See Exhibit 18, USACE 14 September 2018 Letter at pg. 5.* USACE's estimate may have changed, but the point is that the government's estimate was disclosed to a non-federal party prior to the reprocurement award, meaning the privilege cannot be asserted. Likewise, in deposition discovery in the Litigation, certain deponents released information regarding the reprocurement process and the time for completion of same. The privilege is no longer applicable.

Fourth, if the USACE is truly concerned that Request No. 14 seeks exempt material (which Watts maintains that it does not), USACE can redact those portions of the responsive documents that might be exempt. An outright refusal to produce documents, however, is not warranted.

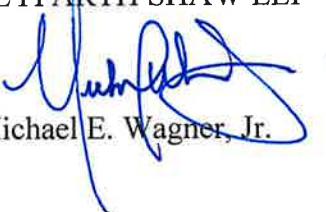
III. Conclusion

For the aforementioned reasons, we respectfully request that the DA's appellate authority make a final determination on Watts' Request within 20 working days after receipt of this Appeal, order USASOC to conduct an independent search of its records without USACE's interference, and order USASOC to release the documents and records sought in the Request. Watts reserves all rights to proceed on a deemed denied basis and bring suit in a United States District Court to compel release of the documents. If Watts is required to file suit, it will seek an order requiring the Army to pay Watts' reasonable attorney's fees and other litigation costs incurred in prosecuting Watts' FOIA request and this Appeal.

This Appeal is timely filed. Please contact me if you have any questions or wish to discuss. We look forward to a prompt resolution of Watts' Appeal.

Sincerely,

SEYFARTH SHAW LLP


Michael E. Wagner, Jr.

MEW
Enclosures

